ute). *Stratton* v. *Ham*, has appended to it a note containing a citation of all the cases up to that date (1856).

GUARDIAN.—So it was held in Massachusetts that a guardian cannot be charged by the trustee process, for the debts of his ward, upon the ground that the ward's money, while in the hands of his guardian, was in the custody of the law: *Gassett* v. *Grout*, 4 Met. 486; *Davis* v. *Drew*, 6 N. H. 399; *Vierheller* v. *Brutto*, 6 Ill. App. 95; *Hansen* v. *Butler*, 48 Me. 81; *Perry* v. *Thornton*, 7 R. I. 15; *Godbold* v. *Bass*, 12 Rich. 202. In case of a guardian of a spendthrift, it is different, and they may be charged as garnishee: *Hicks* v. *Chapman*, 10 Allen 463.

CONFLICT BETWEEN STATE AND FEDERAL COURTS.—The Supreme Court of the United States has laid down the rule that when executions from a state court and from a court of the United States are both levied, if there be no lien by judgment, the one under which a seizure is first made, must prevail, and hold the property: *Brown* v. *Clarke*, 4 How. 4.

Even where the judgment liens are equal (*Pulliam* v. *Osborne*, 17 How. 471), as between a judgment creditor and an administrator holding under the order of a probate court of a state (*Williams* v. *Benedict*, 8 Id. 107), or in favor of a receiver holding under the order of the court of a state and a judgment creditor (*Wiswall* v. *Sampson*, 14 Id. 52), or a trustee in possession under an order of court, and such a creditor: *Peale* v. *Phipps*, Id. 368.

The goods seized on an attachment by the marshal cannot be taken out of his possession by a writ of replevin, because the possession of the marshal is the possession of the court, and pending the litigation no other court of concurrent jurisdiction is permitted to disturb that possession: *Freeman* v. *Howe*, 24 How. 450; *Slocum* v. *Mayberry*, 2 Wheat. 2; *Hammock* v. *Loan and Trust Co.*, 105 U. S. 82; *Kern* v. *Huidekoper*, 103 Id. 491. But if the marshal wrongfully seize the goods, the federal courts will not protect him if a suit for trespass is brought against him: *Buck* v. *Colbath*, 3 Wall. 334.

Yet if the goods are attached and sold under an order of court given after the levy of the attachment writ, being an adjudication of their liability to sale, the officer is not liable to the assignee in bankruptcy of the defendant: *Conner* v. *Long*, 104 U. S. 228; *Johnson* v. *Bishop*, 1 Woolw. 324; *Bradley* v. *Frost*, 3 Dill. 457; *Duffield* v. *Horton*, 73 N. Y. 218.

Whiskey in bond, under the control of a United States officer, is as much in custody of the law as if in the hands of a marshal: *May* v. *Hoaglan*, 9 Bush 191.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of the United States.

THE E. E. BOLLES WOODEN WARE COMPANY *v.* THE UNITED STATES.

In an action for timber cut and carried away from the land of plaintiff, the measure of damages is: (1) Where the defendant is a knowing and wilful trespasser, the full value of the property at the time and place of demand; or of suit brought with no deduction for labor and expense of the defendant. (2) Where the defendant is

an unintentional or mistaken trespasser, or his innocent vendee, the value at the time of conversion, less what the labor and expense of defendant and his vendor have added to its value. (3) Where defendant is a purchaser, without notice of wrong, from a wilful trespasser, the value at the time of such purchase.

THIS was a writ of error to the Circuit Court for the Eastern District of Wisconsin, founded on a certificate of division of opinion between the judges holding that court.

The facts, as certified, out of which this difference of opinion arose appear in an action, in the nature of trover, brought by the United States for the value of 242 cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida tribe of Indians, in the state of Wisconsin. This timber was knowingly and wrongfully taken from the land by Indians, and carried by them some distance to the town of Depere, and there sold to the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase.

The timber on the ground, after it was felled, was worth twenty-five cents per cord, or $60.71 for the whole, and at the town of Depere, where defendant bought and received it, $3.50 per cord, or $850 for the whole quantity. The question on which the judges divided was whether the liability of the defendant should be measured by the first or the last of these valuations.

It was the opinion of the circuit judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum. Defendant then took this writ of error.

The opinion of the court was delivered by

MILLER, J.—We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a wilful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine: *Martin* v. *Porter*, 5 Meeson & Welsby 351; *Morgan* v. *Powell*, 3

Ad. & E. (N. S.) 218; *Wood* v. *Morewood*, 3 Id. 440; *Hilton* v. *Woods*, L. R., 4 Eq. 438; *Jegon* v. *Vivian*, L. R., 6 Chancery 760.

The doctrine of the English courts on this subject is probably as well stated by Lord HATHERLY, in the House of Lords, in the case of *Livington* v. *Rawyards Coal Co.*, L. R., 5 App. Cas. 33, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie."

There seems to us to be no doubt that in the case of a wilful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the state courts the milder rule has been applied even to this class of cases. Such are some that are cited from Wisconsin: *Singlo* v. *Schneider*, 24 Wis. R. 299; *Weymouth* v. *Railroad Co.*, 17 Id. 550.

On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.

Winchester v. *Craig*, 33 Mich. 205, contains a full examination of the authorities on the point: *Heard* v. *James*, 49 Miss. 236; *Baker* v. *Wheeler*, 8 Wendell 505; *Baldwin* v. *Porter*, 12 Conn. 484.

While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class where a purchaser from him

is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were guilty of no wilful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the wilful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant who purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued.

It seems to us that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.

On what ground then can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser.

But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place, and in its then condition, is worth $850, and he wants to satisfy the claim of the government by the payment of $60. He founds his right to do this, not on the ground that anything *he* has added to the property has increased its value by the amount

of the difference between these two sums, but on the proposition that in purchasing the property, he purchased of the wrongdoer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but, as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none.

Such is the distinction taken in the Roman law as stated in the Institutes of Justinian, Lib. II., Title I., sect. 34.

After speaking of a painting by one man on the tablet of another, and holding it to be absurd that the work of an Appelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter had possession fairly, he says, as translated by Dr. Cooper: "But if he, *or any other*, shall have taken away the tablet feloniously, it is evident the owner may prosecute by action of theft."

The case of *Nesbitt* v. *St. Paul Lumber Co.*, 21 Minn. 491, is directly in point here. The Supreme Court of Minnesota says: "The defendant claims that because they (the logs) were enhanced in value by the labor of the original wrongdoer in cutting them, and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value, that is, that he is not entitled to recover the full value at the time and place of conversion." That was a case, like this, where the defendant was the innocent purchaser of the logs from the wilful wrongdoer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition and affirmed a judgment for the value at Anoka, the place of sale.

To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner who, by fencing and vigilant attention, can protect his valuable trees, the government has no adequate defence against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural and other specified uses, has been used to screen the lawless depredator who destroys and sells for profit.

To hold that when the government finds its own property in hands but one removed from these wilful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrongdoer, by providing a safe market for what he has stolen, and compensation for the labor he has been compelled to do to make his theft effectual and profitable.

We concur with the circuit judge in this case, and the judgment of the circuit court is affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME JUDICIAL COURT OF MASSACHUSETTS.[2]

SUPREME COURT OF MISSOURI.[3]

SUPREME COURT OF OHIO.[4]

SUPREME COURT OF RHODE ISLAND.[5]

SUPREME COURT OF VERMONT.[6]

ACCORD.

Parol Release of Judgment for less Sum than due.—A parol release of a judgment for money, in consideration of the payment of a less sum, is invalid, although such release is indorsed upon the execution issued in the original action: *Weber* v. *Couch*, 134 Mass.

ACTION. See *Tender*.

AGENT.

Contract by Broker—Payment to Broker by Purchaser.—A broker who was not intrusted with the possession of the property, contracted in his own name to sell the same to a vendee, who had no knowledge that the broker was not the real owner but dealt with him as such. The broker notified his principals that he had sold for them, and directed

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1882. The cases will probably appear in 7 Otto's Reports.

[2] From John Lathrop, Esq., Reporter; to appear in 134 Mass. Rep.

[3] From T. K. Skinker, Esq., Reporter; to appear in 77 Mo. Reports.

[4] From E. L. De Witt, Esq., Reporter. The cases will probably appear in 38 or 39 Ohio St. Rep.

[5] From Arnold Green, Esq., Reporter; to appear in 14 R. I. Rep.

[6] From Edwin T. Palmer, Esq., Reporter; to appear in 55 Vt. Rep.